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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 1035

JOSEPH BERTMAN, doing business as Bertman Food Products,

Petitioner,

against

J. A. KIRSCH CO., and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD FELDMAN,
Attorney for Petitioner,
32 Broadway,
New York, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The petitioner above-described, respectfully prays that a writ of certiorari issue in the above-captioned case directed to the United States Court of Appeals for the Second Circuit to review its order dated and entered January 31, 1964 (App. 1).[1]

1. As a convenience to the Court there is annexed as an appendix the affidavit in support of the motion to the Court of Appeals and the affidavit in opposition thereto. These papers comprise the record below, except for the memorandum of law in opposition to the motion submitted to the Court of Appeals by respondent Kirsch.

Opinions Below

There was no opinion by the Court of Appeals.

Jurisdiction

The order of the Circuit Court of Appeals sought to be reviewed was dated and entered January 31, 1964. The time within which this petition for a writ of certiorari might be filed will expire on April 30, 1964.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, section 1254.

Proceedings Below

Because the petition deals with petitioner's right to appeal in a unique situation not provided for by the Federal Rules of Civil Procedure, the proceedings below are fully set forth in "Statement" portion of this opinion and repetition here would be burdensome.

Question Presented

1. In the absence of any rule governing the procedure to be followed, does the Circuit Court of Appeals have discretion to include within the ambit of the appeal of a plaintiff-appellant from a judgment in favor of a defend-

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2. The order was entered *sub nomine* United States of America, Plaintiff-Appellant v. Joseph Bertman d/b/a Bertman Food Products, Defendant-Appellee; Joseph Bertman d/b/a Bertman Food Products, Defendant and Third-Party Plaintiff-Appellant v. I. A. Kirsch Co., Third-Party Defendant-Appellee. Actually, the United States has no real interest in the petition since the issue raised here lies as between petitioner and respondent Kirsch. Respondent United States submitted no papers to the Court of Appeals in opposition to petitioner's motion in that court.

ant and third-party plaintiff-appellee, the appeal of said third-party plaintiff-appellee from that portion of said judgment in favor of the third-party defendant, where the third-party plaintiff-appellee did not become a party contingently aggrieved by said judgment until the plaintiff-appellant filed its notice of appeal, and where plaintiff-appellant filed its notice of appeal on the very last day that it could do so with the result that the third-party plaintiff-appellee did not get notice thereof until his time to appeal as against the third-party defendant from said judgment had already expired?

Statutes Involved

28 U.S.C.A.

"1291. Final decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C.A.

"2107. Time for appeal to court of appeals

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding, of a civil nature, before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry."

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from if it is a final decision, and within fifteen days after its entry if it is an introductory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein described, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

Federal Rules of Civil Procedure:

"Rule 73. Appeal to a Court of Appeals:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment, the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *"

"(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. * * *"

Statement

The United States of America instituted an action against the petitioner claiming a breach of contract in the delivery of certain imported tomato paste (App. 1-2). The tomato paste was claimed to have been in violation of the Food Drug and Cosmetic Act at the time of its delivery to the United States of America (App. 2). By reason of this allegedly faulty delivery, the Government claimed that the tomato paste violated a certain contractual warranty and also a provision of the contract relating to spoilage of the tomato paste because of faulty canning abroad, during a six-months period following delivery (App. 2).

Petitioner defended on the following grounds: (a) that the tomato paste was not in violation of the Food Drug and Cosmetic Act at the time of delivery to the Government; (b) that the claimed spoilage was due to improper handling and storage by the Government; and, (c) that the contract relied on by the Government did not represent the agreement of the parties.

The petitioner also claimed over against the respondent J. A. Kirsch Co., from whom petitioner had purchased the tomato paste in the United States. The substance of the petitioner's claim over was contingent and alleged that if, in fact, the Government established that the tomato paste delivered to it violated the Food and Drug Act, then the third-party defendant Kirsch was responsible because such a finding would establish that Kirsch had delivered faulty tomato paste to petitioner (App. 5-6).

The litigation went to trial in the United States District Court for the Southern District of New York, and at the trial the issues between petitioner and respondent Kirsch were clearly framed on a contingent basis. Petitioner took the position at the trial and clearly asserted that if

the jury found that the tomato paste which he had delivered to the Government did not violate the Food and Drug Act, then he, petitioner, had no claim whatever against the third party defendant Kirsch (App. 6-7).

The respondent Kirsch asserted certain other defenses as against the petitioner, but those defenses did not and could not come into play unless and until the jury found that the tomato paste did in fact violate the Food and Drug Act. Manifestly, if the jury found that the tomato paste which Kirsch delivered to petitioner, and petitioner in turn delivered to the Government, complied with the Food and Drug Act, then any other defenses which Kirsch might have asserted as against petitioner's claim-over could not be reached because the pre-condition for petitioner's claim against Kirsch would have disappeared with the jury's finding in the Government's action.

After an extensive trial at which many experts on both sides were heard, the jury found that the Government had not established that the tomato paste was defective at the time of delivery or that it was improperly canned abroad. As a result of this finding, and on petitioner's own claim, the jury was compelled to find that the petitioner had no claim whatsoever against the third party defendant Kirsch (App. 7, 14).

Judgment was entered in favor of the petitioner against the Government, and in favor of the respondent Kirsch against the petitioner. When judgment was entered, petitioner was not a party aggrieved by that judgment in any sense. Since the jury found that the tomato paste was not in violation of the Food and Drug Act, any claim that petitioner had against the respondent Kirsch evaporated.

The Government thereafter waited until the very last day available to it to docket its appeal from the judgment

(App. 19). Petitioner did not receive notice of appeal until after the sixty days had expired. Accordingly, the time within which the petitioner could file and serve a notice of appeal on the respondent Kirsch expired before petitioner even knew that the Government was appealing from the judgment.

Before the Government docketed its appeal, petitioner was not a party aggrieved and had nothing to appeal from. He could not appeal from the judgment entered against him in favor of the respondent Kirsch for he was not aggrieved by that judgment on his own statement that his claim against the respondent Kirsch was wholly contingent upon the outcome of the Government's claim against him. With the Government appeal, however, then petitioner once again is contingently jeopardized. If the Court of Appeals reverses and finds that the tomato paste violated the Food and Drug Act at the time of its delivery then the Court of Appeals should also review whether the judgment in favor of the respondent Kirsch can stand in the face of such a finding. If the Court of Appeals affirms in favor of petitioner then, once again, he has no claim against Kirsch.

The Federal Rules of Civil Procedure make no provision for a situation where a successful defendant has no valid basis for the taking of an appeal as against a successful third-party defendant unless and until the unsuccessful plaintiff appeals as against him. There being no provision in the Rules of Federal Procedure to cover the situation, petitioner moved in the District Court for leave to file a late notice of appeal. This motion was denied without prejudice by the District Court, subject to an application being made for the same relief in the Circuit Court of Appeals. Thereafter, petitioner filed and served

a notice of appeal and also moved in the Circuit Court of Appeals to be declared an appellant within the ambit of the Government's notice of appeal, which notice of appeal read as follows:

> "Notice is hereby given that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on October 28, 1963." (App. 18-19.)

The Circuit Court of Appeals denied petitioner's motion without opinion (App. 1).

Reasons for Allowance of the Writ

1.

The jurisdiction of this Court is properly invoked on the ground that the denial by the Court of Appeals of petitioner's motion to be declared an appellant had the effect of finality and effectively concluded any and all rights, contingent or otherwise, which petitioner had over as against the respondent Kirsch.

2.

The only ground permitted by the Federal Rules of Civil Procedure for the filing of a late notice of appeal, appears in Rule 73(a),[3] which calls for "a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment . . .". In candor, petitioner could not claim any such lack of notice.

3. The effect of this late filing is not known for such a late filing is not provided for by the Rules of Civil Procedure.

There is no provision in the Federal Rules of Civil Procedure to cover the situation presented to the Court of Appeals, and now to this Honorable Court.

Unless and until the Government appealed from the judgment entered against it, petitioner here was not a party aggrieved and any question as between the petitioner and the respondent Kirsch was moot and unappealable. Had petitioner filed and served a notice of appeal before the Government had first done so, such appeal would have been vain and an imposition on the Court of Appeals, and subject to immediate dismissal on the basis of the petitioner's very own assertion in the District Court that he had no claim against the respondent Kirsch unless and until the Government could establish a claim against him.

The Federal Rules of Civil Procedure make no provision for this procedural anomaly. Until the Government appealed, petitioner did not even have a contingent complaint with the respondent Kirsch's judgment against him because the judgment, in its entirety, represented a complete victory for petitioner. The possibility of a claim against Kirsch could only be revived by the Government taking an appeal. Until that occurred, petitioner had a complete victory and no reason to act.

This Court, in the recent past, has enunciated a doctrine of liberality designed to preclude the extinguishment of substantial rights by reason of enigmas in the law created by a failure of the Rules of Civil Procedure to comprehend situations such as the one at bar.

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U. S. 215, 83 S. Ct. 283, 9 L. Ed. 2d 261.

Thompson v. *Immigration and Naturalization Service*, 375 U. S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404;

Woltsohn v. *Hankin* (No. 680), — U. S. —, 84 S. Ct. 699, decided February 24, 1964.

It is respectfully submitted that a writ of certiorari should issue directed to the Circuit Court of Appeals for the Second Circuit, to establish the right and duty of that Court to reconsider petitioner's application liberally, so that petitioner's right to appeal not be wiped out by reason of an omission in the rules to provide for the situation which the petitioner faces.

Unless this is done, petitioner may find himself faced with the following dilemma: (a) If the Court of Appeals reverses and sends the issue back for a new trial, petitioner's right to continue to assert his contingent claim over, as against the respondent Kirsch will have been extinguished because such a reversal could not affect the judgment in favor of the respondent Kirsch against petitioner unless the Kirsch portion of the judgment is also before it; or, (b) if the Court of Appeals reverses and grants judgment for the plaintiff, it will do so without being able to review the jury's action as against the respondent Kirsch, so that, even if it might have reversed the judgment in favor of the respondent Kirsch and granted a judgment over against said respondent, it will be in no position to do so.

The judgment in the action was a single judgment with two decretal paragraphs (App. 9). The Government's notice of appeal is from that entire judgment without qualification or limitation as to any particular decretal paragraph thereof. In view of the circumstances herein-

before set forth, it is respectfully submitted that the Circuit Court of Appeals had the discretion to include and should have included, in the exercise of discretion, within the ambit of the Government's appeal, the appeal of the petitioner as against the respondent Kirsch. To do otherwise, as it did, was to work an unnecessary prejudice against the petitioner because of a failure of the Rules of Civil Procedure to provide for the situation hereat bar.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.

APPENDIX

Decision of Court of Appeals, Second Circuit, on Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,
Defendant-Appellee.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,
Defendant and Third Party
Plaintiff-Appellant,

v.

J. A. KIRSCH CO.,
Third Party Defendant-Appellee.

MOTION FOR AN ORDER DECLARING THE DEFENDANT AND THIRD-PARTY PLAINTIFF AS APPELLANT AS AGAINST THE THIRD-PARTY DEFENDANT, OR, IN THE ALTERNATIVE, GRANTING THE DEFENDANT AND THIRD-PARTY PLAINTIFF LEAVE TO APPEAL

Leonard Goldman, New York, N. Y., for defendant and third party plaintiff.

Motion denied.

J. E. L.
S. R. W.
T. M.

31 January 1964

U.S.C.J.J.

A2

Notice of Motion

UNITED STATES COURT OF APPEALS

For the Second Circuit

United States of America,

Plaintiff-Appellant

Joseph Berman, d/b/a Berman Food Products,

Defendant-Appellee

Joseph Berman, d/b/a Berman Food Products,

Defendant and Third Party Plaintiff-Appellant

J. A. Kriss & Co.,

Third Party Defendant-Appellee

Please take notice that the undersigned will move this Court at a term for motions thereof, to be held at the Courthouse, Foley Square, New York, N. Y. Room 1710, on the 27th day of January, 1965, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order declaring the defendant and third party plaintiff an appellant as against the third party defendant within the ambit of the Notice of Appeal by the plaintiff from a final judgment entered in the Office of the Clerk of the United States District Court, for the Southern

District of New York on October 28, 1963, or, in the alternative, granting the defendant and third party plaintiff leave to appeal from said judgment; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
January 17, 1964.

Yours, etc.,

LEONARD FELDMAN,
Attorney for Defendant and
Third Party Plaintiff,
Office & P.O. Address
32 Broadway,
New York 4, N. Y.

To:

ROBERT M. MORGENTHAU, Esq.
Attorney for Plaintiff
United States Courthouse,
Foley Square, New York, N.Y.

BURKE & SHAPIRO, Esqs.,
Attorneys for Third Party Defendant,
295 Madison Ave., New York 17, N. Y.

Affidavit of Leonard Feldman in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,
Defendant-Appellee.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,
Defendant and Third-Party
Plaintiff-Appellant,

v.

J. A. KIRSCH CO.,
Third-Party Defendant-Appellee.

State of New York }
County of New York } ss.:

LEONARD FELDMAN being duly sworn, deposes and says:

I am the attorney for the defendant and third party plaintiff in the above entitled action, and make this affidavit in support of the relief sought in the Notice of Motion.

THE HISTORY OF THE ACTION

Plaintiff instituted an action against Joseph Bertman in the District Court at Cleveland, Ohio, claiming a breach of

contract in delivering tomato paste which violated the Food, Drug and Cosmetic Act.

The defendant Bertman had purchased the tomato paste in question from the third party defendant J. A. Kirsch Co.

The plaintiff claimed that at the time of delivery of the tomato paste in question, the tomato paste was in violation of the Food, Drug and Cosmetic Act. The defendant claimed that if, in fact, he had delivered tomato paste which violated the Food and Drug Act, that the third party defendant had delivered tomato paste to him which was in violation of that Act and consequently that he had a claim over against the third party defendant for any damages sustained by him in the event the plaintiff was successful in its claim as against him.

Although there were many collateral issues of contract, warranty, and the like, as between and among the parties in the action, the nub of the case was whether the tomato paste violated the Food Drug and Cosmetic Act at the time it was delivered by the defendant to the plaintiff. If the tomato paste was not violative of that Act at the time of such delivery, then the plaintiff had no cause of action against the defendant Bertman, and the defendant Bertman, in turn, had no claim whatever as against the third party defendant Kirsch.

By reason of the fact that the issues were best tried in New York, the plaintiff's action against the defendant and the defendant's claim over as against the third party defendant, were consolidated into a single action in New York and tried as such under a single index number.

The pre-trial order made by the trial court on January 8, 1963, fixed the foregoing issues. That pre-trial order

provided, in part, that as between the plaintiff and the defendant Bertman, the issues, among others, were:

> "6. Did the defendant Bertman fail to render performance because the tomato paste delivered by him to the plaintiff either did not meet the description contained in the contract or because of deterioration of the tomato paste?"
>
> . . . . .
>
> "9. Did the defendant Bertman deliver tomato paste in breach of the agreement between plaintiff and the defendant, Bertman?"

The pre-trial order also provided, as between the defendant Bertman and the third party defendant Kirsch, as follows:

> "5. Did Kirsch deliver to Bertman tomato paste in violation of the standards of the Food and Drug Administration?"

The pre-trial order also provided as follows:

> "The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order."

Although it was possible for the jury to have found against the defendant and in favor of the third party defendant (this based on the defenses offered by the third party defendant), if the jury found in favor of the defendant as against the plaintiff there was no possible claim by the defendant against the third party defendant.

The issues proceeded to trial before Hon. Edmund L. Palmieri and a jury. The theory of presentation by the plaintiff against the defendant related to the issue of what the contract was between the parties and whether the

defendant Bertman breached that contract by delivering tomato paste in violation of the Food and Drug Act. The presentation by the defendant Bertman, so far as his claim against the third party defendant Kirsch was concerned, was that if the jury found that the tomato paste which Kirsch delivered to Bertman was in violation of the Food and Drug Act, that Kirsch was liable to Bertman. If, on the other hand, the jury found that the tomato paste did not violate that Act, then the defendant Bertman had no claim as against the third party defendant Kirsch.

Because of the complexity of the issues involved, Judge Palmieri submitted interrogatories to the jury. In response to those interrogatories, the jury found that the Government had not established that the tomato paste violated the Food Drug and Cosmetic Act at the time of delivery to the plaintiff. Once the jury made that finding, the Government could not prevail as against the defendant and the defendant could not prevail as against the third party defendant. The jury made other findings in favor of the defendant with regard to the contract issue, but it was on the basis of the finding that the tomato paste complied with the Food Drug and Cosmetic Act when admitted into the United States, that the defendant Bertman's claim against the third party defendant Kirsch evaporated.

As a result of the jury's responses to the interrogatories, the trial court directed the entry of judgment in favor of the defendant Bertman as against the plaintiff dismissing the plaintiff's complaint, and in favor of the third party defendant as against the third party plaintiff, dismissing the claim by the defendant against the third party defendant.

Upon the entry of judgments the defendant Bertman was a completely victorious defendant. He had succeeded

completely as against the plaintiff, and by no stretch of the imagination was he aggrieved so far as the judgment involving the plaintiff was concerned.

So far as the third party defendant was concerned, Bertman again was not aggrieved in any respect. His position always had been that he had no claim against the third party defendant Kirsch unless and until the plaintiff could sustain a claim against him. Accordingly, he was not aggrieved by the judgment so far as the third party defendant was concerned. When judgment was entered there was nothing from which Bertman could appeal or had reason to appeal.

The Plaintiff's Appeal Postponed

The plaintiff waited until the very last day available to it to appeal from the judgment. That appeal was not docketed until the sixtieth day. Notice of that appeal was not received by the defendant and third party plaintiff until after the time of the defendant and third party plaintiff to appeal had expired.

Until the plaintiff appealed, the defendant Bertman was neither actually nor potentially an aggrieved party with a concomitant right to appeal from the judgment entered against him in favor of the third party defendant. No independent appeal could possibly lie in favor of the defendant from the judgment in favor of the third party defendant, unless and until the plaintiff actually appealed from the judgment in favor of the defendant against it. The reason for this is to be found in the fact that until the plaintiff actually appealed, the judgment against the plaintiff was absolute. So long as that judgment remained absolute, any appeal that the defendant might have taken would have been completely frivolous and subject to prompt dismissal for being such.

When the plaintiff filed its Notice of Appeal it did not limit that appeal in any respect. It appealed from the entire judgment and by doing so brought for review before this Court everything that had happened at the trial below. Because the trial was a single trial with consolidated issues, a single judgment was entered. That judgment in its adjudicatory provisions reads as follows:

> "Adjudged that the defendant, Joseph Bertman, d/b/a Bertman Foods Products have judgment against the plaintiff, United States of America, dismissing the complaint, and it is further
>
> Adjudged that the third party defendant, J. A. Kirsch Co. have judgment against the defendant and third party plaintiff, Joseph Bertman, d/b/a Bertman Food Products, dismissing the third party complaint."

The plaintiff's Notice of Appeal, a copy of which is annexed hereto, appealed from that judgment in its entirety.

By waiting until the sixtieth day to appeal from the judgment, and by giving notice of appeal by way of mail in such manner that the notice was not received until the possible time of the defendant to appeal as against the third party defendant had expired, the plaintiff actually undertook to bring up for review the entire judgment, and also seriously and severely prejudiced the defendant's position and literally foreclosed the defendant from protecting himself by filing a timely Notice of Appeal limited to and conditioned upon the outcome of the plaintiff's appeal.

From a practical point of view, the defendant and third party plaintiff again asserts that it has no claim nor can be be prejudiced in his relations with the third party

defendant unless and until the plaintiff is successful in its appeal. Inasmuch as the plaintiff has undertaken to bring up for review before this Court the entire judgment and consequently all of the issues which were tried below, it would appear completely appropriate, in view of the plaintiff's procedures, that the defendant and third party plaintiff be deemed to be included as an appellant in all proceedings before this Court. If this is not done, then the plaintiff's conduct has seriously and irreparably prejudiced the defendant when there was no reason for such a result to occur.

By reason of the foregoing circumstances, it is respectfully submitted that the defendant and third party plaintiff be deemed an appellant within the ambit of the plaintiff's Notice of Appeal or, in the alternative, that the defendant be given leave to appeal to this Court.

LEONARD FELDMAN

Sworn to before me, this 17th day of January, 1964

HAROLD A. TAFT
Notary Public, State of New York
No. 30-3926100
Qualified in Nassau County
Commission Expires March 30, 1965

Affidavit of Richard J. Burke in Opposition to Motion

UNITED STATES COURT OF APPEALS

FOR THE SOUTHERN CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH BERTMAN, d b a BERTMAN FOOD PRODUCTS,

Defendant.

JOSEPH BERTMAN, d b a BERTMAN FOOD PRODUCTS,

Defendant and Third-Party Plaintiff,

v.

J. A. KIRSCH CO.,

Third-Party Defendant.

State of New York }
County of New York } ss.:

RICHARD J. BURKE, being duly sworn, deposes and says:

That he is a member of the firm of Burke & Shapiro attorneys for the third party defendant J. A. Kirsch Co. and makes this affidavit in opposition to the motion of the third party plaintiff for an order declaring him to be an appellant or in the alternative granting him leave to appeal.

The judgment herein was entered on October 28, 1963 in favor of the defendant Joseph Bertman against the

plaintiff United States of America, and in favor of the third party defendant J. A. Kirsch Co. against the third party plaintiff Joseph Bertuian. The time to appeal from the judgment expired December 27, 1963.

Not mentioned in the third party plaintiff's moving papers is the circumstance that he moved in the United States District Court for the Southern District of New York for leave to appeal, and his motion came on to be heard before that Court on January 16, 1964. This motion was disposed of by the District Court by endorsing the following upon the motion papers:

> "Motion denied without prejudice to defendant renewing his motion following disposition of motion to be made by defendant in the Court of Appeals for leave to appeal.
>
> January 16, 1964
>
> It is so Ordered
>
> (s) Dudley B. Bonsal
> U.S.D.J."

Despite this determination, on January 27, 1964 the third party plaintiff filed a notice of appeal, a copy of which is annexed hereto.

Rule 73(a) and Rule 6(b) of the Rules of Civil Procedure, Rule 10(a) of the Rules of this Court, and Section 2107, Title 28 U.S.C. permit an extension of time to file a notice of appeal for one cause only, viz: upon a showing of excusable neglect "based on a failure of a party to learn of the entry of the judgment".

The third party plaintiff does not claim that he was unaware of the entry of the judgment.

Rule 73(b) states that the "notice of appeal shall specify the parties taking the appeal". The notice of appeal filed by the plaintiff United States of America herein specifies the party taking the appeal is the plaintiff, United States of America.

Unless the foregoing Rules and statute are to be ignored the third party plaintiff cannot now be declared to be an appellant in this case, nor can he be granted leave to appeal.

The issues litigated between the plaintiff United States of America and the defendant Joseph Bertman were essentially different from those litigated between Joseph Bertman as third party plaintiff against J. A. Kirsch Co., as third party defendant. The Government had claimed as against Bertman that it had a written contract with him for the purchase of tomato paste and that among its terms was a requirement that there should be no deterioration in the quality of the tomato paste for a period of six months after delivery to the Government; also a provision that the tomato paste must comply with the Federal Food, Drug and Cosmetic Act.

Bertman had purchased the tomato paste in question from the third party defendant J. A. Kirsch Co. As between Bertman and Kirsch, Kirsch claimed (and Bertman agreed) that their contract of sale contained no provisions with regard to quality and that all of Kirsch's obligations with respect to quality would be satisfied if the Food and Drug Administration at New York issued certificates passing the merchandise and permitting its entry into this country from abroad. This the Food and Drug Administration did. Specific questions were submitted to the trial jury by the Court concerning the contract between Kirsch and Bertman as follows, all of which the jury answered in the affirmative:

"5. Was it the understanding between Bertman and Kirsch that Kirsch's obligations as regards the quality of the tomato paste would be satisfied if the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

6. Were the obligations of Kirsch to Bertman pursuant to their agreement complied with by Kirsch when the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

7. Did Bertman rely entirely upon the issuance by the Food and Drug Administration at New York of its release certificates in paying Kirsch for the tomato paste which Bertman purchased from Kirsch?".

It is evident therefore that the judgment in favor of Kirsch against Bertman was bottomed upon the jury's answers to these questions and not upon the jury's findings that there was no liability in the first instance by Bertman to the Government. The defendant and third party plaintiff Joseph Bertman should have anticipated that the Government might appeal from the judgment against it, and nothing prevented him from filing a notice of appeal within sixty (60) days of the judgment from that portion of the judgment which was favorable to Kirsch in order to protect himself against that eventuality. Having failed to do so he has waived his right to do so.

Deponent therefore respectfully submits that the motion ought to be denied.

Deponent also respectfully asks that this affidavit be deemed to be an application to dismiss the appeal filed by the third party plaintiff on January 17, 1964.

RICHARD J. BURKE

Sworn to before me this
21st day of January, 1964

RUTH FLAX
Notary Public, State of New York
No. 03-6381000
Qualified in Bronx County
Commission Expires March 30, 1964

Notice of Appeal of Defendant and Third Party Plaintiff, Annexed to Affidavit of Richard J. Burke

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH BERTMAN, d b/a BERTMAN FOOD PRODUCTS,

Defendant.

JOSEPH BERTMAN, d b.a BERTMAN FOOD PRODUCTS,

Defendant and Third-Party Plaintiff,

v.

J. A. KIRSCH CO.,

Third-Party Defendant.

SIRS:

NOTICE IS HEREBY GIVEN that the defendant and third party plaintiff, Joseph Bertman, d b a. Bertman Food Products, hereby appeals to the United States Court of

Appeals for the Second Circuit, from the final judgment entered in the above entitled action on October 28, 1963.

Dated: New York, N. Y.
January 16, 1964

Yours, etc.,

LEONARD FELDMAN
Attorney for Defendant and
Third Party Plaintiff,
Office & P.O. Address:
32 Broadway
New York 4, N. Y.

To:

CLERK OF THE SOUTHERN DISTRICT OF NEW YORK,
United States Courthouse
Foley Square, New York, N. Y.

ROBERT M. MORGENTHAU, Esq.,
Attorney for Plaintiff,
United States Courthouse
Foley Square, New York, N. Y.

BURKE & SHAPIRO, Esqs.,
Attorneys for Third Party Defendant,
295 Madison Ave., New York, N. Y.

Notice of Appeal of Plaintiff United States of America

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK

Civ. 138-89

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,

Defendant.

JOSEPH BERTMAN, d/b/a BERTMAN FOOD PRODUCTS,

Defendant and Third Party Plaintiff,

v.

J. A. KIRSCH CO.,

Third-Party Defendant.

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

SIR:

NOTICE IS HEREBY GIVEN that the plaintiff, United States of America, hereby appeals to the United States Court of

Appeals for the Second Circuit from the final judgment entered in this action on October 28, 1963.

Dated: New York, New York
December 27, 1963

Yours, etc.,

ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Attorney for United States of
America
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New York, N. Y. 10007
Tel: Cortlandt 7-7100 Ext. 465

To:

CLERK FOR SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, N. Y. 10007

To:

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Attorney for Defendant and Third-Party Plaintiff
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BERGER & SHARPING, Esqs.
295 Madison Avenue
New York 17, N. Y.

MAY
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 1035

JOSEPH BERTMAN, doing business as
BERTMAN FOOD PRODUCTS,

Petitioner,

against

J. A. KIRSCH CO.; and the
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT J. A. KIRSCH CO. IN OPPOSITION

RICHARD J. BURKE and MYRON L. SHAGIN,
Attorneys for Respondent,
J. A. Kirsch Co.,
205 Madison Ave.,
New York, N. Y. 10017

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Question Presented

Whether a Court of Appeals, after the time to appeal has expired, should grant leave to a defendant and third-party plaintiff to appeal from so much of a judgment as was in favor of the third-party defendant, where the defendant's only excuse for failure to file a timely notice of appeal is that he did not learn that the plaintiff had taken an appeal until after the defendant's time to appeal had expired.

Additional Rule Involved

"Rule 6—Time * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Jan. 21, 1963, eff. July 1, 1963."

Statement

The judgment of the District Court (App. 9) was entered on October 28, 1963. The time to appeal from the judgment expired December 27, 1963.

The petitioner did not bring on his motion in the District Court for leave to file a late notice of appeal until January 16, 1964. The District Court denied his motion on the same day, without prejudice to him renewing his motion following disposition of a motion to be made by him in the Court of Appeals for leave to appeal (App. 12). Nevertheless, on January 17, 1964 he filed a late notice of appeal which was dated January 16, 1964 (App. 12, 16-17).

Petitioner then brought on a motion on January 27, 1964 in the Court of Appeals for leave to appeal, or in the

alternative for an order declaring him to be an appellant as against the third-party defendant "within the ambit of the notice of appeal by the plaintiff". The Court of Appeals denied this motion on January 31, 1964.

The issues litigated at the trial between the plaintiff United States of America and the defendant Joseph Bertman were essentially different from those litigated between Joseph Bertman as third-party plaintiff against J. A. Kirsch Co. as third-party defendant. The Government had claimed as against Bertman that it had a written contract with him for the purchase of tomato paste and that among its terms was a requirement that there should be no deterioration in the quality of the tomato paste for a period of six months after delivery to the Government; also a provision that the tomato paste must comply with the Federal Food, Drug and Cosmetic Act.

Bertman had purchased the tomato paste in question from the third-party defendant J. A. Kirsch Co. As between Bertman and Kirsch, Kirsch claimed (and Bertman agreed) that their contract of sale contained no provisions with regard to quality and that all of Kirsch's obligations with respect to quality would be satisfied if the Food and Drug Administration at New York issued certificates passing the merchandise and permitting its entry into this country from abroad. This the Food and Drug Administration did. Specific questions were submitted to the trial jury by the Court concerning the contract between Kirsch and Bertman as follows, all of which the jury answered in the affirmative:

> "5. Was it the understanding between Bertman and Kirsch that Kirsch's obligations as regards the quality of the tomato paste would be satisfied if the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

6. Were the obligations of Kirsch to Bertman pursuant to their agreement complied with by Kirsch when the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

7. Did Bertman rely entirely upon the issuance by the Food and Drug Administration at New York of its release certificates in paying Kirsch for the tomato paste which Bertman purchased from Kirsch?" (App. 13-14)

Argument

Rule 73(a) of the Federal Rules of Civil Procedure permits an extension of the time to file a notice of appeal upon a showing of excusable neglect "based on a failure of a party to learn of the entry of the judgment".

Rule 6(b) specifically states that the Court may not extend the time for taking action under Rule 73(a) except to the extent and under the conditions stated in Rule 73(a).

The petitioner does not claim that he was unaware of the entry of the judgment (Pet. 8), or that he supposed for any reason that his time to appeal had been extended.

Rule 73(b) states that the "notice of appeal shall specify the parties taking the appeal". The notice of appeal filed by the plaintiff United States of America herein specifies the party taking the appeal is the plaintiff United States of America.

The foregoing Rules, as well as Section 2107 of Title 28 U.S.C. (Pet. 3-4), have often been held to be mandatory and jurisdictional.

The petitioner cites three recent decisions by this court: *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215; *Thompson* v. *Immigration and Naturalization*

Service, 375 U. S. 384; *Wolfsdon* v. *Hankin* (No. 680), ——— U. S. ———, 84 S. Ct. 699, 11 L. Ed. 2d 636. All three cases resemble each other in the respect that the appellants therein had relied upon extensions of time granted, and findings and statements made by the District Courts, and had therefore not filed their notices of appeal within the time limited by the Rules, although they could easily have done so, and probably would have done so, if they had not been misled by the actions taken by the District Courts.

No such situation is presented here. The petitioner did not rely upon any action taken by the District Court. He simply allowed his time to expire, apparently, so far as appears from his attorney's affidavit in the Court of Appeals (A4 10), without making any effort to ascertain from the plaintiff whether it intended to appeal, and without checking with the office of the Clerk of the Court on the sixtieth day to determine whether any notice of appeal had been filed by the plaintiff.

In *Whitehead* v. *American Security & Trust Co.*, 285 F. 2d 282 (U.S.C.A., D. of C., 1960), the plaintiff filed her appeal from a judgment in favor of the defendant on the last day. The defendant and third-party plaintiff was two days late in filing its appeal from so much of the judgment as dismissed its complaint against the third-party defendant. The Court of Appeals noted that the defendant evidently had not intended to appeal unless the plaintiff appealed from the judgment in favor of the defendant. The defendant urged substantially the same argument in opposing a motion to dismiss its appeal as does petitioner here. However, its appeal was dismissed for lack of jurisdiction, the Court pointing out, among other things, that Rule 73(b) provides that the notice of appeal "shall specify the parties taking the appeal; * * *", and that the notice which was filed by the plaintiff specified that the

appeal was taken by the plaintiff (as does the plaintiff's notice of appeal here), and not by the defendant.

It is evident that the judgment in favor of Kirsch against Bertman was bottomed upon the jury's answers to the specific questions submitted to them (pp. 3-4, *supra*) and not upon the jury's finding that there was no liability in the first instance by Bertman to the Government. The defendant and third-party plaintiff Joseph Bertman should have anticipated that the Government might appeal from the judgment against it, and nothing prevented him from filing a notice of appeal within sixty days of the judgment from that portion of the judgment which was favorable to Kirsch in order to protect himself against that eventuality. Having failed to do so, he has waived his right to do so.

Language from the concurring opinion in *Tallman v. Tidall*, 324 F. 2d 411, 418 (U.S.C.A., D. of C., 1963), in another context, is appropriate here:

> "It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. BURKE and MYRON L. SHAPIRO,
Attorneys for Respondent,
J. A. Kirsch Co.